

No. 83-765

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL
Petitioner,

v.

NATHANIEL WELLS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN REPLY TO PETITION
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I. There Is No Conflict Among the Circuits.

The actual question presented, consistent with the facts, is as follows:

Where the trial court found as facts that Respondent employee was not promoted to a higher-paying, lighter-duty job because of his race and in retaliation for his having filed charges with the EEOC, and with the knowledge by Petitioner employer that employee's back injury prevented his continuing employment without such promotion,

did the courts below properly award such employee back pay from time employee was forced to leave employment until time of trial?

The Fourth Circuit opinion, upholding an award of approximately \$20,000 to the Respondent Nathaniel Wells in this case to compensate Mr. Wells for economic injury suffered as a proximate result of willful racial discrimination, does not conflict with the decisions of the Fifth and Tenth Circuits cited by the petitioner at page 9 of its petition. The purported argument of the petitioner that the decision below by the Fourth Circuit does so conflict is frivolous.

Writing for a unanimous panel of the Fourth Circuit, Senior (formerly Chief) Judge Haynsworth considered the main case relied on below by the petitioner, Miller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), and held that on the facts of the instant case, it is unnecessary to reach the constructive discharge issue. Judge Haynsworth said, "We think the back pay award was proper whether or not Wells was constructively

discharged." (Slip opinion, p. 5; Appendix A to petition, p. 17.) The Fourth Circuit's opinion below went on to note that: "Wells reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's [petitioner's] wrongful denial of a promotion." (Slip opinion p. 6; Appendix A, p. 18; emphasis added.) The Fourth Circuit held that whether the issue was looked at as one of constructive discharge, or direct proximate causation of racial discrimination, the evidence adduced at trial, and the trial court's findings of fact, supported approximately \$20,000 in back pay to Mr. Wells following his leaving employment due to a back injury in September, 1975.

In all, Mr. Wells was awarded a total of \$22,256.80. Of this, approximately \$20,000 was what was awarded to Mr. Wells as back pay from the period after September 22, 1975, until time of judgment. The remaining amount, which is not in dispute in this Court, represents the pay differential between stock clerk or porter and sales

clerk between the time July, 1974, when Wells should have been promoted and September, 1975, when his back condition forced him to leave employment with the petitioner ABC Board. The district court also ordered Mr. Wells to be rehired in the next available cashier's position coming open with the petitioner ABC Board, and this relief was also affirmed by the Fourth Circuit. Mr. Wells in fact was rehired as a cashier and has been working in that position since October 1, 1983, when several cashier's positions came open with the Durham County ABC Board.

Even if this case is treated only as a constructive discharge situation, the Fourth Circuit's opinion does not conflict with the decisions from the Fifth and Tenth Circuits as argued by the petitioner. In the first place, the Fourth Circuit noted that petitioner ABC Board kept Wells in the position of stock clerk for over one year after he should have been promoted to sales clerk or cashier, with full knowledge from Wells and his physicians that it was inappropriate medically

for Mr. Wells to be required to remain in the stock clerk position due to the heavy lifting that position required. Thus the Fourth Circuit reasoned that Mr. Wells reasonably ended his employment as stock clerk and his duty of mitigation did not require that he continue in the job of stock clerk with its heavy lifting duties.

The fact situation in the instant case is far different than that in Muller, supra. In Muller, while the employer failed to promote an employee to a job of "spell foreman" and assigned him to a position which made it impossible for him to attain the position of "spell foreman," this was insufficient conduct by the employer to make things so difficult for the employee as to bring about his discharge or separation. Nevertheless, the Tenth Circuit correctly held that the doctrine of constructive discharge is applicable to civil rights cases; but the decision in Muller that there was not sufficient evidence of a constructive discharge of the plaintiff in that case turned upon the particular fact situation of that case.

Likewise, in Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (1980), the Fifth Circuit held the actions taken by the employer to be insufficient to constitute "working conditions so intolerable that the employee is forced into an involuntary resignation...." Baroque, supra, at 65, quoting Young v. Southwestern Savings & Loan Assn., 509 F.2d 140, 144 (5th Cir. 1975). The Fifth Circuit in Baroque continued its rule that the motive of the employer is not the test of whether there has been a constructive discharge, rather the focus must be upon the conditions imposed. Looking at the conditions imposed in Baroque, two of the circuit judges of the three-judge panel found the conditions insufficient to constitute a constructive discharge; the dissenting judge looking at the facts thought the actions taken in Baroque were conditions so intolerable as to amount to a constructive discharge, properly noting that whether a constructive discharge has occurred must be determined on a case-by-case basis. The actions that the majority found insufficient in Baroque

to equal a constructive discharge were the failure of the employer there to pay a woman equally with men in the same position, the making by the employer of discriminatory statements about promoting a woman to the job in question, and the imposing by the employer of a trial period not required of men promoted into the job.

Needless to say, the fact situation in Baroque is vastly different from the fact situation in the instant case, where Mr. Wells suffered from a back condition which his employers knew from the reports of his physicians would make it impossible for him to continue employment with the ABC system unless he was promoted to the lighter duties of sales clerk.

The district court, in finding a constructive discharge, specifically applied the Miller case in reaching its decision following the trial of this Title VII action (see Appendix B to the Petition for Certiorari, p. 55.) With respect to the award of back pay to Mr. Wells from the time the trial court found he was discriminatorily denied

a promotion from porter or stock clerk to sales clerk, including the time period after Mr. Wells' back condition forced him to leave employment with the ABC Board, Senior (formerly Chief) Judge Gordon of the United States District Court for the Middle District of North Carolina found the following facts:

(1) There are four job classifications in the ABC stores -- they include the stock clerk or porter's position requiring heavy lifting and strenuous physical work; and the sales clerk or cashier's job, which "is far less strenuous than that of the porter." (Appendix B, finding of fact no. 3, pp. 25-26; footnote omitted.)

(2) The job of porter (or technically stock clerk) is the lowest paying, most physically strenuous job in the ABC system. (Appendix B, finding of fact no. 4, p. 27.)

(3) From February 1, 1969, through September 1975, the petitioner ABC Board hired eleven whites directly into the higher position of sales clerk who had no prior experience with the ABC system,

instead of promoting qualified black persons, such as Mr. Wells, despite their grater experience working in the system. (Appendix B, finding of fact no. 8, p. 28.)

(4) At trial, ABC general manager Leathers testified that white persons were only interested in the higher paying sales clerk position, while blacks would "take anything". (Appendix B, finding of fact no. 11 p. 29.)

(5) The ABC Board, between the dates of February 1, 1969, and September 22, 1975, the period at issue in the litigation, engaged in a pattern and practice of racial discrimination against blacks with the result that all black persons hired by the ABC Board were hired at the lowest level of porter or stock clerk, while whites were directly employed, without prior experience, into the position of sales clerk, even where black employees who were qualified, experienced, and wanted to obtain promotions were available to promote. (Appendix B, finding of fact no. 13, p. 30.)

(6) In June, 1974, Respondent Wells asked

the general manager, Leathers, for a promotion to sales clerk. He did not get promoted, and on July 24, 1974, Mr. Wells filed a complaint with the Durham Human Relations Commission over this. On August 1, 1974, a white man, W.R. Porter, with no prior experience, was hired directly into a sales clerk position. (Appendix B, findings of fact no. 30-32, p. 35.)

(7) On September 4, 1974, Mr. Wells injured his back while lifting a case of whiskey. This injury was known to the general manager, Leathers. Wells asked to be promoted to a sales clerk or cashier's job, but the general manager, Leathers, refused the request for promotion and testified at trial that he could not allow someone with a bad back to operate a cash register. (Appendix B, finding of fact no. 34, p. 36.)

(8) In October, 1974, while refusing to promote Mr. Wells, Leathers did permit him to return to his more strenuous job duties of porter or stock clerk. (Appendix B, finding of fact no. 35, p. 36.)

(9) Mr. Wells was qualified to be a sales clerk when he applied for the position in June, 1974. (Appendix B, finding of fact no. 37, pp. 37-38.)

(10) Mr. Wells was denied promotion to the sales clerk position in August, 1974, because of his race. (Appendix B, finding of fact no. 38, p. 38.)

(11) In October of 1974, Wells and his co-plaintiff, Jerry Allen, who had also sought a promotion which was denied because he was black, filed complaints with the Equal Employment Opportunity Commission, and both the general manager Leathers and the members of the ABC Board had notice of these charges. (Appendix B, finding of fact no. 39, pp. 38-39.)

(12) In June, 1975, Mr. Wells reinjured his back on the job, and because of this injury missed 29 working days between June 12 and September 15, 1975. His treating physician at the Duke University Medical Center wrote a letter to general manager Leathers recommending that Mr. Wells be

employed in an area where he would not be required to do extensive heavy lifting. On September 18 and on September 22, 1975, another treating physician wrote general manager Leathers concerning the medical diagnosis of Mr. Wells' back condition, and stressed the importance of Mr. Wells' lifting no more than 10 to 15 pounds and not stooping or bending for prolonged periods.

(Appendix B, findings of fact nos. 40-42, pp. 39-40.)

(13) On September 22, 1975, Mr. Wells had to cease work for the ABC Board because of his back condition. Mr. Wells did receive disability checks from the ABC's insurance provider for a period of two years, until the benefits ran out.

(Appendix B, finding of fact no. 43, p. 40.)

(14) Mr. Wells left employment with the ABC Board as a result of his inability to do the heavy lifting required in the porter's or stock clerk's position because of the fact he was refused an opportunity to become a sales clerk.

(Appendix B, finding of fact no. 44, p. 41.)

(15) On October 27, 1975, a white person with no prior experience was hired as a combination sales clerk/stock clerk, and one month later was promoted to fulltime sales clerk. (Appendix B, finding of fact no. 45, p. 41.)

(16) The ABC's general manager Leathers gave white employees with disabilities worse than Wells' back disability the opportunity to work as a sales clerk. One such white individual had a deformed hand and could not lift cases of whiskey at all. A second white man who had two spinal fusions to correct major back problems was also given the opportunity to work for the ABC system as a sales clerk. The ABC Board permitted certain employees, all white, to work in positions in the ABC stores to avoid heavy lifting. Mr. Wells was not allowed to avoid heavy lifting because he is black and because he challenged through the Durham Human Relations Commission and the EEOC the employment practices of the ABC Board. It was the refusal of the ABC Board to allow Mr. Wells a promotion to a job where he could avoid heavy lifting that forced him

to leave his employment with the ABC system in September, 1975. (Appendix B, findings of fact nos. 46-47, pp. 42-43.)

Upon the above findings of fact, the trial court then determined that Mr. Wells offered a prima facie case of racial discrimination in the refusal to promote him to the lighter duty work of sales clerk under the analysis by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the reason offered by the ABC Board in defense of its actions "was a pretext." (Appendix B, pp. 48-54, quoting from p. 54.)

Not only did the District Court below find racial discrimination against Mr. Wells due to the failure to promote him from a stock clerk to a sales clerk position, but the trial court also found as a fact that Mr. Wells was constructively discharged by the ABC Board under the Muller test, which the petitioner ABC Board contends is appropriate to apply. The trial court carefully analyzed the facts it found in light of the Muller decision, found that Mr. Wells had made out a

prima facie case for retaliation and constructive discharge, and rejected the ABC Board's arguments to the contrary. Judge Gordon in the trial court's memorandum opinion in this matter stated:

[I]t is concluded that the continued denial of promotion even after several letters from Wells' doctors to the ABC Board was, more likely than not, motivated by the fact that Wells had challenged the promotion policy of the ABC Board. In reaching this conclusion, the Court looks to the totality of the evidence. The defendant's arguments to the effect that Wells was not qualified and that there was no light duty in the ABC system offered in rebuttal have been considered and rejected....

(Appendix B, pp. 57-58; emphasis added.)

II. The Courts Below Properly Applied Section 706(g) of Title VII.

Because of the facts found by the trial judge, the remedy of back pay from the time Mr. Wells was forced to leave employment and apply for disability insurance benefits through time of trial -- decreased by income Mr. Wells received from insurance and new employment -- is consistent with the remedies required by Title VII of the

Civil Rights Act of 1964, and is not in contravention of Section 706(g). As the Fourth Circuit correctly found, whether this case is viewed as one in which the three refusals to promote Mr. Wells because of his race proximately caused his economic damage, or as one where the employer constructively discharged him in retaliation for his Human Relations and EEOC complaints, he is entitled to the damages awarded.

It is clear from the facts found by the trial court and emphasized, supra, that the ABC (1) refused to promote Mr. Wells in August, 1974, to a sales clerk job because of his race; (2) refused to promote again in September, 1974, after he injured his back in the strenuous stock clerk (porter's) job because of his race and Human Relations Commission complaint, and (3) refused again between June and September, 1975, to promote him because of his race and to retaliate for his EEOC complaint with knowledge that Mr. Wells' doctors said he should not lift even 15 pounds or do prolonged stooping and bending and with know-

ledge that the stock clerk's job required him to lift routinely 50-pound cases of whiskey.

Under those circumstances, Section 706(g) of the Act was not erroneously applied by the lower courts. As Petitioner ABC Board concedes, Title VII mandates broad remedial relief; yet here the relief was narrow and specifically tailored to make Mr. Wells whole despite the intentional racial discrimination and retaliation against him. The trial court carefully calculated his damages and gave the ABC Board credit for all mitigation deductions to which it was entitled.

Had Mr. Wells not injured his back, or had the injury not been sufficient to preclude his continuing in the stock clerk (porter's) job, it is beyond dispute that he would have been entitled to the difference between a sales clerk's higher salary and his stock clerk's salary up through the time of trial. Through no fault of Mr. Wells, he was forced eventually to leave his ABC Board employment in his lower-level job because of his back injury and because the ABC Board still re-

fused his requests to promote him to a job he could physically do and rightfully should have had by August, 1974, even before his back injury. What this means, as the Fourth Circuit found, is that the measure of damages after September 22, 1975, became the difference in what Mr. Wells would have earned in the sales clerk job and the 60% of the stock clerk's salary he was drawing from disability insurance. Even Petitioner does not dispute that the trial court was correct in awarding Mr. Wells the difference in salary in the two positions from August, 1974, through September 22, 1975.

If the case is viewed as one of retaliatory constructive discharge, as the District Court also concluded based on its findings of facts, clearly its award to Mr. Wells also was correct. Regardless of the theory used, the mathematical calculation comes out the same way. And, regardless of the theory used, the Congressional intent behind the passage of Title VII was upheld, not thwarted. It is wholly specious to argue, as does Petitioner, that the lower courts, and especially the Fourth

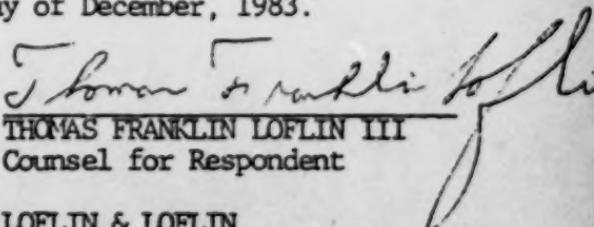
Circuit, acted in defiance of Section 706(g).

The overwhelming evidence at trial showed, and the Petitioner ABC in the Fourth Circuit conceded that the failures to promote Mr. Wells to the lighter duty sales clerk job was because of racial discrimination.

CONCLUSION

The issue in the present case is narrow and unique to the fact situation of this case, and no amount of rhetoric can convert it into one warranting review by this Court on certiorari. The facts found against the Petitioner by the trial court mandated the relief awarded to Mr. Wells, and the Fourth Circuit is clearly correct in upholding this relief. Therefore, the petition for certiorari should be denied.

This the 6th day of December, 1983.


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CERTIFICATE OF SERVICE

The undersigned attorney, Thomas Franklin Loflin III, a member of the Bar of the Supreme Court of the United States, and counsel of record for the Respondent herein, hereby certifies that on the 7th day of December, 1983, pursuant to Rule 28, of the United States Supreme Court Rules, he served three copies of the foregoing Respondent's Brief In Opposition to the Petition for Writ of Certiorari on each of the parties herein as follows:

On Petitioner Durham County Board of Alcoholic Control, by depositing said three copies in the United States post office located at Durham, North Carolina, with first-class postage prepaid, properly addressed to the post office address of Petitioner's counsel of record, William V. McPherson, Jr., Esquire, Post Office Box 2729, Durham, North Carolina 27705.

All parties required to be served have been served.

Dated December 7, 1983.

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